Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1181

Department of Human Resources (formerly State Department of Public Welfare) of the State of Texas,

Petitioner

v.

Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, and Michael Blumenthal, Secretary of the Treasury,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Joseph A. Califano, Jr.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, the Department of Human Resources of the State of Texas (formerly the State Department of Public Welfare of the State of Texas), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on July 25, 1977, as to which petition for rehearing was denied on September 23, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 556 F.2d 326, appears at Appendix A, infra, pp. 1-a4. The opinion of the United States District Court for the Western District of Texas is

reported at 388 F.Supp. 1304 and is included herein in Appendix A, infra, pp. 15-25.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 25, 1977. A timely petition for rehearing was denied on September 23, 1977. On the 19th day of December, 1977, Associate Justice Lewis H. Powell, Jr. signed an order extending the time for filing of this petition for writ of certiorari to and including February 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals should have applied the provisions of 42 U.S.C. 1316(a)(1) and (2), the procedure for determination by the Secretary of HEW as to conformity of State plans submitted by a State to the Secretary for approval under the Social Security Act, to the facts of this case rather than the provisions of 42 U.S.C. 304, 604, 1204, 1354 and 1316(a)(3), the procedure applicable when a State fails to substantially comply with provisions to its State Plan, already approved, in the administration of said State Plan.

2. Whether the Secretary of HEW should be required, under the Social Security Act, to process and pay, forthwith, the disputed $92,731,245.00 social services claim of the Department of Human Resources.

3. Whether the Court of Appeals erred by failing to find that the District Court had subject matter jurisdiction to declare the "Twiname Memorandum", an HEW memorandum allegedly interpreting regulations applicable to the Texas claim herein, null and void and

to restrain its application to the Texas claim.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves interpretation and application of the Social Security Act, 49 Stat. 620, Titles I, IV, X, and XIV, as amended, 42 U.S.C. 301-304, 601-604, 1201-1204, 1351-1354, and 1316 and 45 C.F.R. Part 201, 213, 220, 222, and 226. These statutory and regulatory provisions are attached hereto as Appendix C.

STATEMENT OF THE CASE

On July 1, 1971, the Department of Human Resources, then denominated the State Department of Public Welfare and hereinafter referred to as such in this Statement, amended its state plan for social services in order to obtain federal financial participation (matching funds) for purchase of social services from other state agencies. These plan amendments were approved in mid-August, 1971, by the Regional Commissioner of the Social and Rehabilitation Service of HEW. (See Appendix D.)

Shortly after the new plan for purchase of social services went into operation, the Associate Regional Commissioner of Social and Rehabilitation Service advised Raymond Vowell, Commissioner of DPW, that DPW could use *only* funds appropriated to DPW by legislative act for state matching funds in the purchase of social services from other state agencies. In June of 1972, some nine months later, HEW advised DPW that this prior advice was not in keeping with the current national position of obtaining federal financial participation by use of appropriations from other state agencies for the state match. DPW then made a claim for federal financial participation in the purchase of services from other state agencies during the fourth quarter of Federal Fiscal Year 1972 and a retroactive

claim, eventually amounting to $92,731,245.00, for the three prior quarters of Fiscal Year 1972.

HEW approved the claim for the fourth quarter of Fiscal Year 1972 and paid it, although that payment is now the subject of litigation in another suit in the United States District Court for the Western District of Texas. HEW delayed approval of and then withheld the $92,731,245.00, characterizing its action as a "disallowance". The reason given for HEW's action was that DPW had failed to comply with criteria contained in a HEW memorandum, dated December 20, 1972, known as the "Twiname Memorandum", which was ostensibly an interpretation of federal regulations incorporated in the Texas State Plan. (See Appendix D.) The stated reasons for denial of the Texas claim were contained in a letter dated January 19, 1973 from Clarence Lambright, Regional Commissioner of HEW's Social and Rehabilitation Service. (See Appendix D.)

Because the decision of HEW was characterized as a "disallowance", Department of Public Welfare officials requested reconsideration of the decision under 42 U.S.C. 1316 and/or any other administrative relief available, including a compliance hearing under 42 U.S.C. 304, 604, 1204, and 1354. The Secretary of HEW treated the matter as a "disallowance" and concurred in the decision of the Regional Commissioner after "reconsideration" under 42 U.S.C. 1316(d). The treatment of the matter as a disallowance lead to denial to Texas of prior notice, hearing and judicial review. HEW contended that the Secretary's decision upon reconsideration was final.

The State Department of Public Welfare brought suit in the United States District Court for the Western District of Texas, seeking declaratory and injunctive relief and a writ of mandamus. DPW sought to enjoin the withholding of the $92.7 million claim. Jurisdiction

was alleged under 28 U.S.C. 1331, 1361, 2201 and 5 U.S.C. 701 and 706.

After a hearing on a motion to dismiss filed by HEW, the district court declined to dismiss the portion of the plaintiff's first amended complaint requesting that the court direct the Secretary to provide notice and the opportunity for an administrative hearing pursuant to 42 U.S.C. 304, 604, 1204 and 1354, prior to withholding the funds claimed. All other portions of the first amended complaint were dismissed for lack of subject matter jurisdiction. The district court noted that the only possible jurisdiction in the District Court rested upon the Administrative Procedure Act, 5 U.S.C., Sec. 701 et seq., the mandamus statute, 28 U.S.C. 1361, and the Declaratory Judgment Act, 28 U.S.C. 2201.

On February 12, 1975, the District Court decided that the Secretary of HEW was under a mandatory obligation to provide DPW with reasonable notice and opportunity for hearing under 42 U.S.C. 304, 604, 1204, and 1354. In reaching this decision, the Court determined that the issue which was the basis for the withholding of funds in this instance was a compliance issue, based upon an alleged failure to comply substantially with the Texas State Plan. The Court, basing its action upon mandamus jurisdiction, ordered the Secretary of HEW to provide reasonable notice and opportunity for hearing as provided in 42 U.S.C. 304, 604, 1204 and 1354, relative to the withholding of the $92.7 million claimed by DPW. The district court further decided that the failure of the Secretary of HEW to afford reasonable notice and the opportunity for hearing prior to the withholding of said funds was unlawful and in violation of 42 U.S.C 304, 604, 1204 and 1354. The Court, however, refused to order the Secretary of HEW to pay DPW the $92.7 million claim forthwith. *State Department of Public Welfare v.*

Weinberger, 388 F.Supp. 1304 (W.D. Tex. 1975). (See Appendix A.)

The decision of the district court was appealed by both parties. DPW contended that the district court had erred by failing to require an immediate payment of the $92.7 million and by failing to find subject matter jurisdiction to declare the "Twiname Memorandum" of December 20, 1972 null and void and restrain its application to the Texas claim. HEW urged that the district court erred in requiring a compliance hearing under 42 U.S.C. 304, 604, 1204 and 1354 and urged, once again, that the matter be handled under the provisions of 42 U.S.C. 1316(d) and 45 C.F.R. 201.14, as a "disallowance".

The Court of Appeals agreed with the result of the district court opinion in ordering a full administrative hearing but based its decision upon different statutory provisions. It also agreed with the result of the district court in declining to order immediate payment of the Texas $92.7 million claim. It failed to address the issue of the alleged lack of subject matter jurisdiction in the district court to declare the "Twiname Memorandum" null and void and restrain its application to the Texas claim. *State Department of Public Welfare of the State of Texas v. Califano*, 556 F.2d 326 (5th Cir., 1977).

The Court of Appeals found that DPW had submitted a state plan for provision of social services in 1971 and that this plan was approved by HEW and became effective on July 1, 1971. The court stated:

> "State plans which are in operation are scrutinized by HEW to ensure continuing compliance with the requirements of sections 302, 602, 1202 and 1352, and that no 'prohibited requirements' are imposed by the state under the plans. 42 U.S.C. §§ 304, 604, 1204 and 1354. When it appears to the Secretary that the state plan is being operated in

> noncompliance with these regulations, he must give the state agency 'reasonable notice and opportunity for hearing' to evaluate the operation of the plan. States dissatisfied with the outcome of such compliance hearings may petition for direct review in the Court of Appeals. 42 U.S.C. §§ 304, 604, 1204, 1354, 1316(a)(3)." *State Department of Public Welfare of the State of Texas v. Califano*, supra., at pp. 329-330.

The Court of Appeals found that the record revealed that "HEW's reasons for denying the Texas DPW claim amount to a finding of nonconformity with Texas DPW's approved plan and with federal requirements". *State Department of Public Welfare of the State of Texas v. Califano*, supra., at pp. 330-331. In spite of this finding, the Court of Appeals based its decision on the provisions of 42 U.S.C. 1316(a)(1), (2) and (3) in requiring a hearing and judicial review in this case rather than on the requirements of 42 U.S.C. 304, 604, 1204, 1354. In doing so, the Court of Appeals noted " . . . section 1316(a) provisions do not require payment of the claim to Texas pending review". *State Department of Public Welfare of the State of Texas v. Califano*, supra., at p. 332.

The Court of Appeals rejected HEW's contention that its handling of the claim was a "disallowance", which could only be reconsidered pursuant to 42 U.S.C. 1316(d), noting that the state deserved to be put on a more equal basis in this instance and that disallowance procedures must be implemented by means of audit exceptions. 45 C.F.R. 201.13(a), *State Department of Public Welfare of the State of Texas v. Califano*, supra., at p. 332 and footnote 3, p. 329.

The conclusion of the Court of Appeals is best summarized by the following statement from its opinion:

"After reviewing the Act, the statutory history, and the circumstances of the claim, we have determined that the purposes of the Act and the equities are best served by treating this case as a plan—conformity dispute under section 1316(a), and returning the case to HEW for reconsideration in a formal hearing under that section." *State Department of Public Welfare of the State of Texas v. Califano*, supra., at p. 330.

REASONS FOR GRANTING THE WRIT

1. This case is a case of first impression involving significant questions of construction of the Social Security Act. The resolution of these questions will be important in the future administration of the Social Security Act and may have an impact on the processing of billions of dollars in federal funds. It is important that The Supreme Court resolve the question of how congress intended that the portions of the Social Security Act applicable to this lawsuit should be applied.

2. This case arises out of a controversy which involves numerous lawsuits and a dispute between at least 28 states and HEW involving nearly $3 billion. It is extremely important that the legal issues involved herein be resolved correctly by the Supreme Court. This case will establish correct administrative procedures for the processing of the $92.7 million unpaid claim of the State Department of Public Welfare, as well as the $34.8 million in federal funds already paid to and spent by the State of Texas. The final decision in this case will also serve as precedent in the numerous lawsuits now pending in the lower courts which involve the same or similar issues related to processing and handling of state claims for matching funds in the social services program.

3. By failing to require HEW to carry out the mandate of 42 U.S.C. 304, 604, 1204 and 1354, the Court of Appeals denied the State Department of Public Welfare full and immediate payment of an extremely large claim for federal funds to which DPW claims entitlement. The Court of Appeals erred when it applied the provisions of 42 U.S.C. 1316(a)(1), (2) and (3) to the facts which were established by the evidence in this case. As the Court's opinion concluded, the State Department of Public Welfare's state plan was *approved* by HEW on July 1, 1971, pursuant to 42 U.S.C. 1316(a)(1). Therefore, there was no dissatisfaction with that decision and no possible ground for application of 42 U.S.C. 1316(a)(2) and (3). The decision of the Court of Appeals, if left to stand, will lead to confusion and error in the administration of the Social Security Act among HEW and each of the 50 states.

4. This case involves serious jurisdictional issues which the Court of Appeals failed to address. The jurisdiction of a United States District Court to restrain and enjoin the application of criteria and regulations illegally promulgated by a federal agency is necessary and appropriate under 28 U.S.C. 1331(a) and 5 U.S.C. 701 and 706. The Supreme Court needs to clarify the scope of such jurisdiction and resolve any questions which may exist in this regard. *State Highway Commission v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *National Welfare Rights Organization v. Weinberger*, 377 F. Supp. 861 (D. D.C. 1974); *People Ex Rel Bakalis v. Weinberger*, 368 F. Supp. 721 (N.D. Ill. 1973); *Barber v. Collins*, 397 U.S. 159 (1970); *Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Ass'n of Data Processing Service Organization v. Camp*, 397 U.S. 150 (1970); *National Helium Corporation v. Morton*, 455 F.2d 650 (10th Cir. 1971).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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PROOF OF SERVICE

I, Frank C. Cooksey, Acting as Special Assistant Attorney General of Texas, do hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari, being five (5) volumes, have been served on Respondents by placing same in the United States Mail, Certified, postage prepaid, addressed as follows: Honorable Wade H. McCree, Jr., Solicitor General of the United States, Constitution Avenue between 9th and 10th Sts., N. W., Washington, D.C. 20530, and to Mr. Robert S. Greenspan, Attorney, Department of Justice, Civil Division, Appellate Section, Constitution Avenue between 9th and 10th Sts., N. W., Washington, D.C. 20530, on the _____, day of February, 1978.

FRANK C. COOKSEY